United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7341

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FOR THE SECOND CIRCUIT

Docket No. 76-7341

CLYDE H. CUTNER,

Plaintiff-Appellant,

against

ALBERT FRIED, JR., ALBERT FRIED & CO., and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Issue Presented for Review

The only issue raised by this appeal is whether the District Court abused its discretion in dismissing the action with prejudice for lack of prosecution in light of plaintiff's consistent failure to prosecute his claim diligently and to comply with the orders of the Court, including an order permitting the filing of an amended complaint within a specified period of time.

Preliminary Statement

This is an appeal from an Order of the United States District Court for the Southern District of New York, Hon. Lloyd F. MacMahon, denying the motion of plaintiff-appellant Clyde H. Cutner for an order permitting a late filing of an amended complaint and dismissing for failure to prosecute and for failure to comply with orders of that Court. The reasons underlying the District Court's decision are set forth in its opinion (122a).*

* Unless otherwise noted, all references are to the Joint Appendix.

Counterstatement of the Case

This action was commenced on January 12, 1973 against the New York Stock Exchange, Inc. (the "Exchange"), Albert Fried, Jr., a member of the Exchange who, together with others, is registered as a "specialist" in the stock of Skyline Corporation ("Skyline"), and Albert Fried & Co., in which Mr. Fried is a partner (8a). Plaintiff, an active investor (Record on Appeal, doc. no. 29, pp. 4-5), originally sought recovery for himself and for a class consisting of approximately 11,000 members, charging that defendants acted fraudulently and negligently in the regulation of trading in Skyline stock on the Exchange (8a).

Plaintiff's claim was based on the Exchange's decision to suspend trading temporarily in Skyline stock on December 22, 1972 (14a). That decision was prompted by an influx of sell orders following Skyline's unexpected announcement of a decline in earnings (38a, 39a). The suspension in trading occurred on Friday afternoon of Christmas weekend, when Exchange officials determined that it would be unfair to the investing public to continue trading since the vast majority of investors would not have time to hear, much less assess, the news of Skyline's drop in earnings (39a). Exchange officials believed that the suspension in trading was necessary to maintain a fair and orderly market in Skyline stock (39a). Trading was permitted to resume on the following Tuesday, when the stock opened at a substantially lower price (39a).

The District Court, over defendants' opposition, certified the action as a class action in an opinion dated March 13, 1974 and reported at 373 F.Supp. 4. The class was defined as consisting "of all those who held Skyline stock at any time [during the period when trading was suspended] and who suffered damage by reason of any of the wrongful acts alleged in the complaint." (373 F.Supp. at 14) In certifying the class, the Court directed plaintiff "to give individual notice to all class members who can be

identified through reasonable effort" by mail and ordered plaintiff to bear its cost. (373 F.Supp. at 14)*

On April 8, 1974, the District Court approved a form of notice and ordered plaintiff to "promptly submit to the Court recommendations regarding the method by which class members shall be identified and the mailing of notice effectuated." (3a; 44a, Record on Appeal, doc. no. 37).

There then ensued a period of more than fifteen months during which plaintiff did nothing to comply with the Court's orders, notwithstanding the responsibilities then entrusted to him as the class representative. Moreover, plaintiff made no effort during that period to prosecute the action on its merits. Indeed, with the exception of written interrogatories and a request for the production of documents served over two years earlier in March, 1973 (with which defendants timely complied), plaintiff had taken no steps to move the case to trial (114a).

Accordingly, on July 17, 1975, defendants moved for an order decertifying the action as a class action on the grounds that plaintiff had not taken steps to begin the process of notifying the class and had failed to prosecute the action on the merits (31a). Although plaintiff opposed the motion, no step was taken to prosecute the action while the motion was pending.

Recognizing the need to protect absent class members, the Court granted plaintiff a reprieve and denied defendants' motion by order dated September 29, 1975, "without prejudice to renew within 30 days upon a showing that, in the interim, plaintiff has failed to take steps to prosecute this suit diligently" (69a).

When plaintiff failed to take any action whatsoever, defendants renewed their motion to decertify the class on October 29, 1975 (64a). Granting the motion, on November

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* On April 12, 1974, defendants filed a notice of appeal from that part of the Court's decision which granted class certification. On June 20, 1974, the parties stipulated to a dismissal of the appeal.

24, 1975, the Court cited "plaintiff's total lack of concern with the diligent prosecution of this action" and ordered plaintiff to serve and file an amended complaint within 20 days, striking all class allegations, so that the suit could continue solely on his behalf (88a).*

Plaintiff once again failed to comply with the Court's order and the time limit imposed. Not until February 3, 1976, more than two months after the November 24, 1975 order, did plaintiff attempt to file an amended complaint, but the clerk refused to accept it as untimely (94a). On June 18, 1976, the Court denied plaintiff's motion to permit a late filing of the amended complaint and dismissed the action with prejudice for failure to prosecute and to comply with the Court's orders (122-130a). The Court observed:

> "Thus, we are faced with an action, now pending more than 40 months, which is still in the pleading stages, due solely to plaintiff's inexcusable failure diligently to prosecute his claims and to comply with the duly issued orders of this court" (125a).

On July 15, 1976, plaintiff filed his notice of appeal from the judgment dismissing the complaint with prejudice.**

Response to Plaintiff's Statement of the Relevant Facts

Before responding to plaintiff's factual arguments, it is important to place them in proper context.

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* Plaintiff has not appealed from the November 24, 1975, order of the Court decertifying the suit as a class action.

** Plaintiff's pattern of neglect and disregard for judicial procedures has continued in this Court. On August 20, 1976, this Court dismissed the appeal for failure to comply with the scheduling order of the Court. On September 3, 1976, this Court vacated the dismissal of the appeal but only on the condition that plaintiff meet certain time deadlines and pay the cost of opposing his motion to vacate the appeal.

This lawsuit was not brought by an unsophisticated plaintiff or by a litigant unassisted by counsel experienced in the practice and procedure of the federal courts. Plaintiff is employed as a legal investigator by a Philadelphia law firm and he is an active investor (Record on Appeal, Doc. Nos. 29, 19, Ex. A). Plaintiff has taken business law courses and has had experience as a plaintiff in a prior lawsuit (Record on Appeal, Doc. No. 19). Plaintiff's wife, also a holder of Skyline stock and therefore a member of plaintiff's asserted class, is a practicing attorney. The two law firms plaintiff hired at the commencement of this action are experienced and well known in securities litigation in this and other federal courts. Their expertise is summarized in the affidavit of Melvyn I. Weiss, Esq., of Milberg & Weiss in support of the class certification motion (Record on Appeal, Doc. Nos. 15 and 16). Plaintiff's explanation of his disregard of court orders and his failure to prosecute should be considered in light of these facts.

Plaintiff contends (Brief, pp. 7-8) that there was good cause for the failure to give notice and for failure to prosecute the action during the 15-month period between the Court's order directing notice to the class and the first motion for decertification. Plaintiff asserts that Milberg & Weiss, his present counsel, had served merely as "local counsel" in the litigation prior to the motion to decertify and that Milberg & Weiss did not accept primary responsibility for prosecution of the action until August 1975, following a "falling out" bewteen plaintiff and his "principal counsel," the firm of Harold E. Kohn, P.A. (Brief, p. 8; 57a-59a).

These assertions do not square with the arguments made to the Court in connection with the class action motion. At that time, Mr. Weiss of Milberg & Weiss filed the sole affidavit, sworn to April 12, 1973, in support of the motion, suggesting a primary or at least equal status of his firm in representing plaintiff (Record on Appeal, Doc. No. 16). The

affidavit mentioned the firm of Milberg & Weiss as counsel for plaintiff and described in detail the firm's experience and success in cases in which the firm had functioned as lead counsel in complex class actions in securities and antitrust law (*Id.* at 8-9). The affidavit goes on to describe the Kohn firm as "co-counsel" with Milberg & Weiss (*Id.* at 9). A memorandum in support of the motion for class determination was also filed in which Milberg & Weiss was described as being "well known in this District in class action litigation under the securities laws" (Record on Appeal, Doc. No. 15, p. 15). The same memorandum stated that "Plaintiff's counsel includes a Philadelphia firm. . . ." Finally, the memorandum pointed out with reference to both the Milberg & Weiss and Kohn firms, that "*They* can be counted on to engage in vigorous prosecution of this action" (emphasis added) (*Id.*). There is no suggestion anywhere in the record that Milberg & Weiss was merely a "mail drop" for other counsel until late July of 1975, when defendants moved to decertify the class action.

In the three months between July 1975 and the date of defendants' renewed motion for decertification (October 29, 1975), plaintiff and Milberg & Weiss had ample time to go forward with prosecution of the action on the merits, but nothing was done. The Court long before had directed plaintiff to give notice to all class members and had ordered him to submit to the Court a method by which class members would be identified and notice effectuated (373 F.Supp. at 14; 3a, 44a). When defendants moved to decertify the action, plaintiff was alerted to the importance of carrying out the Court's directions and orders issued 15 months earlier. Defendants' motion alone put plaintiff on notice of the possible consequences of his failure to go forward with the action. The very pendency of a motion based upon lack of prosecution should have inspired any serious litigant to comply with the Court's earlier orders and, at the very least, to advance the litigation on the merits.

The only excuse plaintiff now offers for his failure to give notice to the class or to take any steps to prosecute the action following defendants' motion to decertify was his unawareness of the District Court's September 29, 1975 decision denying defendants' first motion to decertify and affording plaintiff thirty days within which to prosecute the action diligently (70-71a). The failure of counsel to learn of that order bespeaks indifference to the prosecution of the action. The docket sheet (where all orders and opinions are recorded) was not reviewed. Nor did counsel check *The New York Law Journal,* where the order also was recorded.*

Plaintiff would take comfort in the fact that he filed a notice to take two depositions two days after the deadline imposed by the Court (Brief, p. 10). However, that notice was served *after* defendants' renewed motion to decertify the class had been filed (4a). There is every indication that the delay would have continued indefinitely had it not been for defendants' renewal of their motion. Moreover, the pretrial discovery now given such weight by plaintiff was, in fact, of little but token import. Although plaintiff did take the deposition of one witness, Albert Fried, Jr., he has never submitted the transcript to Mr. Fried for correction and signature, and, despite notice given, he has made no effort to depose the Exchange (114a). Plaintiff's request in November 1975 for production of documents was for papers produced previously and lost by his counsel (114-115a).

Plaintiff's counsel admits having contemporaneously received the Court's November 24, 1975 memorandum and order decertifying the class and establishing a 20-day limit within which to file an amended complaint (93a). Thus, plaintiff and his counsel were warned for the second time

* Whatever plaintiff's excuse, federal practice makes an order such as that entered by the District Court on September 29, 1975 operative when it is docketed regardless of notice (Rule 77(d), Fed.Rul.Civ.Proc.)

of the Court's concern with "their inexcusable neglect and delay" (91a). Yet plaintiff again failed to meet the deadline established by the Court, letting more than two months go by before attempting to file his amended complaint (124-125a).

Finally, plaintiff contends that in denying his motion for permission to file an amended complaint and dismissing the action for failure to prosecute and comply with Court orders the Court ignored "the fact that extensive interrogatories had been served by plaintiff and answered by defendants, that documents had been produced and were in the process of being reviewed. . ." (Brief, p. 13). The Court did not ignore previous discovery proceedings. On the contrary, they were brought to its attention by plaintiff and placed in proper context by defendants (114-115a): interrogatories had been served and document requests had been made in March of 1973 and complied with by May of 1973—over two years *prior* to defendants' first motion to decertify the class (125a).

I

The District Court did not Abuse its Discretion in Dismissing the Action for Failure to Prosecute and for Failure to Comply with Orders of the Court.

Rule 41(b) of the Federal Rules of Civil Procedure authorizes the dismissal of an action "for failure of the plaintiff to prosecute or to comply with . . . any order of court. . . ." The Supreme Court, in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 629-30 (1962), explained the purpose of the Rule:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to

> avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of *nonsuit* and *non prosequitur* entered at common law . . . and dismissals for want of prosecution of bills in equity. . . . It has been expressly recognized in Federal Rule of Civil Procedure 41(b). . . ."

The Supreme Court went on to state that whether an order of dismissal for failure to prosecute "can stand on appeal depends . . . on whether it was within the permissible range of the court's discretion (footnote omitted)" 370 U.S. at 633.

In *West* v. *Gilbert*, 361 F.2d 314 (2d Cir. 1966), *cert. denied*, 385 U.S. 919 (1966), the rule was stated succinctly by this Court:

> "The District Court has the power to dismiss for failure to prosecute, on its own motion. The matter is discretionary, and on appeal from such an order, an appellate court will not reverse except for an abuse of discretion. *Link* v. *Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *Deep South Oil Co. of Tex.* v. *Metropolitan Life Ins. Co.*, 310 F.2d 933 (2 Cir. 1962); Rule 41(b)."

Accord, *Theilmann* v. *Rutland Hosp., Inc.*, 455 F.2d 853 (2d Cir. 1972)

Plaintiff's complete lack of diligence—indeed his complete indifference to the prosecution of a very substantial claim, first on behalf of the class to which he had a fiduciary responsibility and then on his own behalf, and his repeated disregard of the Court's orders notwithstanding the Court's unmistakeable prodding—provided a sound basis, well within the reasoned exercise of discretion, for dismissal.

This Court repeatedly has endorsed the exercise of the District Court's discretion in dismissing for lack of prosecution in fact situations involving much less delay and fewer failures to meet court orders than presented in this case.

See, e.g., Michelsen v. *Moore-McCormack Lines, Inc.*, 429 F.2d 394 (2d Cir. 1970) (affirming dismissal despite diligent pre-trial prosecution when plaintiff's key witness ill and unable to testify); *Maiorani* v. *Kawasaki Kisen K.K., Kobe*, 425 F.2d 1162 (2d Cir.), *cert. denied*, 399 U.S. 910 (1970) (affirming dismissal when plaintiff's counsel failed to meet trial date after being granted one adjournment).

The Supreme Court in *National Hockey League* v. *Metropolitan Hockey Club*, 96 S.Ct. 2778 (June 30, 1976), has recently recognized again the need to allow broad discretion on the part of district courts in dealing with failures to prosecute. While the dismissal in *National Hockey League* arose from a failure by the plaintiff to comply with discovery schedules, the Supreme Court addressed the question of the exercise of discretion in reinstating a decision dismissing for failure to prosecute. Finding the dismissal to be within the broad discretion of the District Court, the Supreme Court recognized that the Court of Appeals might disagree with the District Court's evaluation of the contumacy involved in the delays evidenced on the record, but ruled that the appellate court could not substitute its own judgment. The Supreme Court made it clear that if the District Court's dismissal is supported by the record as a whole, it should be permitted to stand.

The cases relied upon by plaintiff in support of his argument that dismissal here was an abuse of discretion are inapposite. He accurately notes that the Court in *Theilmann* v. *Rutland Hosp., Inc.*, 455 F.2d 853, 855 (2d Cir. 1972), gave weight to the harshness of a dismissal with prejudice. Nevertheless in *Theilmann*, this Court recognized that a dismissal with prejudice for failure to prosecute is justified when the cumulative acts of the plaintiff result in unnecessary delay. The Court held that there had been no abuse of discretion.

Plaintiff's emphasis (Brief, p. 14-15) on cases which have suggested that measures less extreme than dismissal

with prejudice should be initially employed, overlooks the ample warnings given by the District Court in its memorandum orders of September 29 and November 24, 1975. In those orders, the Court was following the suggestion of *Schwarz* v. *United States*, 384 F.2d 833 (2d Cir. 1967), in taking steps short of dismissal of the claim, thereby giving plaintiff a chance to cure the neglect of counsel. Here the "less drastic" action taken by the Court was insufficient to stir plaintiff's compliance with the Court's orders.

Similarly, in the recent opinion in *Asociacion de Empleados del Instituto de Cultura Puertorriquena* v. *Rodriguez Morales*, Docket No. 76-1062 (1st Cir. July 26, 1976), the First Circuit, while acknowledging that dismissal is a harsh sanction, upheld a dismissal with prejudice for failure to prosecute following the plaintiff's failure to meet successive court-imposed deadlines. Holding that there was no abuse of discretion, the First Circuit observed:

> "In making this determination, we give considerable weight to that part of the order of October 8 wherein the court expressed its displeasure over plaintiffs' failure to have replied to the motion to dismiss. In the light of this clear language in the order of October 8, plaintiffs cannot reasonably claim that they did not have notice of the gravity with which the court viewed their inaction."

Here, the language of the District Court's order of November 24 unmistakenly expressed the Court's displeasure with plaintiff's failure to prosecute and put him on notice of the gravity with which the Court viewed his inactivity (91a). See also, *California Molasses Co.* v. *C. Brewer & Co.*, 479 F.2d 50 (9th Cir. 1973) (affirming dismissal for want of prosecution when plaintiff, despite a warning that discovery be completed in 90 days, failed to make substantial progress because of search for new counsel).

Two additional cases cited by plaintiff in support of his position that dismissal here was an abuse of discretion are clearly distinguishable. In *Peterson* v. *Term Taxi, Inc.*, 429 F.2d 888 (2d Cir. 1970), the plaintiff was merely temporarily detained by understandable circumstances from appearing at the hour set for trial. Again, in *Syracuse Broadcasting Corp.* v. *Newhouse,* 271 F.2d 910 (2d Cir. 1959), this Court reversed a dismissal, observing that the District Court itself did not regard plaintiff's inadequate response to a pre-trial order sufficient to justify dismissal under Rule 41(b) and finding that the District Court thereupon erroneously relied on Fed.Rul.Civ.Proc. 16 to dismiss when plaintiff failed to clarify factual issues.

Plaintiff also cites *Richman* v. *General Motors Corp.*, 437 F.2d 196, 199 (1st Cir. 1971) in which the First Circuit reversed a dismissal for failure to prosecute (Brief, p. 15-16). In *Asociacion de Empleados, supra,* a more recent opinion of the First Circuit, the Court considered a situation in which the plaintiffs had failed to respond to certain court orders and offered as an excuse that their attorneys were moving their offices and had to alter and reconstruct new offices. To this argument, the First Circuit replied: "*Richman* did not, however, establish a per se rule that this or any other particular excuse would make dismissal with prejudice an inappropriate sanction." The Court then went on to hold that the District Court had not abused its discretion in dismissing with prejudice.

In a similar vein, plaintiff attempts to make light of the cumulative weight of his inactivity by asserting that a change of counsel occurred subsequent to defendants' first motion to decertify (Brief, p. 8-9). As mentioned earlier, however, the record on plaintiff's class certification motion clearly demonstrates an active presence on the part of Milberg & Weiss, who have been counsel of record from the outset, and it is settled law that a party cannot avoid the consequences of the acts or omissions of his freely

chosen attorney. *Link* v. *Wabash Railroad Co., supra* at 633-34. Furthermore, there has been no change in counsel as provided by General Rule 4(c) for the United States District Courts for the Southern and Eastern Districts of New York.

Regardless of which of two prominent securities litigation firms was directing the case from time to time, it is interesting that not a word has been said to explain plaintiff's personal indifference to the prosecution of his claims. The doctrine that a party must take the consequences of his lawyer's acts or omissions is even more strongly applicable when the party himself is a sophisticated litigant. *See generally Spering* v. *Texas Butadiene & Chem. Corp.*, 434 F.2d 677, 680 (3d Cir. 1970).

Plaintiff's contention that a present showing of reasonable diligence excuses past delay does not stand up under either the facts or the law he relies upon (Brief, pp. 17-19). The alleged reasonable diligence here was at most half-hearted (one deposition conducted and a document request consisting of recopying of documents previously supplied but lost and not requested again for over two years), inappropriate (the notice was served after the Court's deadline had expired), and unpersuasive (the notice was served apparently only as a response to defendants' renewed motion to decertify). Moreover, the only opinion cited in this connection, *United States* v. *Myers,* 38 F.R.D. 194, 197 (N.D. Cal. 1964), is distinguishable. In *Myers,* as in this action, there was a delay of more than two years following the filing of the complaint, but there the defendant failed to make any motion to dismiss for lack of prosecution. The plaintiff, on its own initiative, had filed requests for admission and shortly thereafter filed a motion for summary judgment. It was only in response to such motion that the defendant moved for dismissal for failure to prosecute. The Court denied the motion, stating that there would have been ample grounds to grant the motion had it

been made in a timely fashion—before the plaintiff had taken steps to prosecute diligently. *See also Bautista* v. *Concentrated Employment Program of Dept. of Labor*, 459 F.2d 1019 (9th Cir. 1972) (affirming dismissal for failure to prosecute despite the plaintiff's answering and serving interrogatories six days after a court instigated order to show cause why the case should not be dismissed for failure to prosecute was continued for 60 days.)

Plaintiff also suggests that lack of prosecution must arise out of willful behavior (Brief, pp. 19-24). In *Theodoropoulos* v. *Thompson-Starrett Co.*, 418 F.2d 350 (2d Cir. 1969), *cert. denied*, 398 U.S. 905 (1970), this Court considered and rejected that proposition. There, counsel on two occasions had failed through inadvertence to file a note of issue within a time set by the district court. This Court, citing *Link* v. *Wabash Railroad Co., supra*, affirmed dismissal under Rule 41(b) and stated:

> "The second lapse on the part of plaintiffs' counsel was hardly 'less blameworthy' than the breach which caused the initial dismissal. Instead, it was a second and similarly inexcusable failure to comply with an order to move a case toward trial promptly. First the appellants' attorneys forgot or ignored the terms of their own stipulation, and then they lost track of the fact that their motion to vacate the dismissal had been granted. *Whether this represented calculated dilatoriness or mere carelessness, dismissal under F.R.Civ.P 41(b) was proper.*" (emphasis added) 418 F.2d at 354.

Finally, plaintiff argues that the District Court improperly failed to consider the alleged lack of prejudice to defendants in dismissing the action (Brief, pp. 25-27). The Court was not required to consider this claim since it properly held that "lack of due diligence" on the part of plaintiff is the "operative condition" of Rule 41(b) (127a). Plaintiff's attempt to distinguish *Messenger* v. *United States*, 231 F.2d 328 (2d Cir. 1956), merely avoids address-

ing the authority the District Court did cite, *Klein* v. *Spear, Leeds & Kellogg*, 65 F.R.D. 406, 410 (S.D.N.Y. 1974) and *Theodoropoulos* v. *Thompson-Starrett Co., supra*, 418 F.2d at 353. In any event, in *Joseph Muller Corp. Zurich* v. *Societe Anonyme de Gerance et D'Armement*, 508 F.2d 814, 815 (2d Cir. 1974), this Court recently held that lack of prosecution based upon unexplained and unreasonable delay could be a valid cause for dismissal with prejudice without regard to any showing of actual prejudice to the defendant. *See also Alexander* v. *Pacific Maritime Ass'n*, 434 F.2d 281, 283 (9th Cir. 1970) *cert. denied*, 401 U.S. 1009 (1971) (determining that no showing of specific impairment to defendants is necessary because the law presumes injury from unreasonable delay); *FDIC* v. *Lotsch*, 3 F.R.D. 464 (E.D.N.Y. 1944) (holding that mere pendency of a claim prejudices defendants since their conduct cannot be vindicated).

Plaintiff's failure to follow the Court's direction and orders of March 13 and April 8, 1974 leading to decertification after 17 months of neglect, his failure to prosecute the action in spite of the Court's warnings in its order of September 29, 1975, and his plain disregard of a clear request and order of the Court and a further warning as to lack of diligence in its opinion of November 24, 1975 show a pattern more than sufficient to justify the District Court's conclusion that "plaintiff has been guilty of protracted delay occasioned only by his own inexcusable neglect" (127a). In dismissing the action, the Court did not abuse its discretion.

II

The District Court Properly Denied Plaintiff's Motion for Permission to Make a Late Filing of an Amended Complaint.

Plaintiff seeks to divert attention from his failure to prosecute by asking this Court to treat the District Court's dismissal for failure to prosecute as a matter entirely

separate from plaintiff's failure to comply with the Court's order requiring the filing of an amended complaint (Brief, p. 29-31). This attempt to fragment the reasoning underlying the Court's exercise of discretion mischaracterizes the one true issue presented on this appeal. Addressing the issue of whether to permit plaintiff's untimely filing of an amended complaint, the District Court observed:

> "Our order directing the filing of the amended complaint within 20 days was clear and unequivocal. Plaintiff cannot claim that he was unaware of the order, as his counsel admits that an appeal was contemplated. Nor did he make any request for an extension of time before the period had expired. And the record of this case, as noted above, demonstrates that plaintiff has been guilty of protracted delay occasioned only by his own inexcusable neglect" (127a).

In *Sloan* v. *Canadian Javelin, Ltd.*, (1973-1974 Transfer Binder) CCH Fed.Sec.L.Rep. ¶ 94,579 (S.D.N.Y. May 30, 1974), the plaintiff was given 20 days to serve and file an amended complaint but did not do so until 19 days after the period had expired. Granting a motion to dismiss the amended complaint for untimely filing, Judge Bonsal considered a history of delay and failure to meet Court deadlines—no greater than that compiled by plaintiff here—and concluded:

> "While the plaintiff is entitled to his day in court, and in addition, since he appears *pro se*, is entitled to a degree of latitude in the framing of pleadings and motions, it is unfair and prejudicial to the defendants here if they are required to engage in round upon round of costly and time-consuming motion practice directed to a complaint that the plaintiff did not even timely file." ¶ 94,579, at 96,033.

In short, it was altogether appropriate for the District Court to consider plaintiff's failure to file an amended complaint in the context of his repeated disregard of Court orders and his failure to prosecute.

III

The District Court Properly Considered Calendar Congestion in Exercising its Discretion.

Plaintiff argues at some length that the Court placed too much emphasis on the need to reduce calendar congestion (Brief, p. 27-29), citing *Peterson* v. *Term Taxi, Inc., supra,* in which this Court recognized that "the trial judge must have the power to control his docket, and that adjournments, postponements and the rescheduling of cases contribute to the serious calendar problem existing in the Southern District of New York." Plaintiff points out that despite such language, this Court reversed a dismissal for failure to proceed with trial in *Peterson.* The facts in the *Peterson* case, however, are entirely different from those present here. The first and only failure to comply with court requirements arose when plaintiff was not present at the opening of trial. Moreover, the plaintiff's absence on that occasion occurred because notice of a Monday morning trial was not given to plaintiff's attorney until late Friday afternoon and he was not able to alert the plaintiff. This Court noted as well that counsel was present on the day of trial and prepared to try the case, having submitted and filed the necessary trial memoranda and requests for charge. In that situation, this Court understandably found that substantial justice had not been done. Plaintiff's posture here is much different. There were three separate occasions on which he neglected to comply with Court orders and the overall delay in advancing the case extended for over two years. A more pertinent decision is *Michelsen* v. *Moore-McCormack Lines, Inc., supra,* where the District Court's dismissal of a complaint for failure to prosecute was upheld with specific reference to the need to control the serious calendar problem existing in the Southern District of New York.

The Court here correctly observed that the protracted delay occasioned by plaintiff's inexcusable neglect neces-

sarily affects the Court's ability to control both its civil, and, more importantly, its criminal calendar. Plaintiff argues (Brief p. 27-29) that this Court should reverse because the dismissal denied substantial justice merely for the sake of calendar control. It is plain, however, that the Court's discretion was exercised with plaintiff's own indolence and disregard for its orders uppermost in mind. The record plaintiff compiled in no sense suggests that he has been denied substantial justice. The Court cannot be faulted for pointing out the consequences of his lethargy and refusal to comply with Court orders, particularly where the calendar is congested.

Plaintiff also attacks as an abuse of discretion dismissal of an action "for the purpose of encouraging litigants to comply with court orders and to keep calendars current." (Brief p. 28). This was not the sole purpose for dismissal. In any event it is an appropriate factor to be considered by trial judges responsible for the disposition of hundreds of cases under the deadlines established by Rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act (18 U.S.C. §§ 3161, *et seq.*), and the Plan for Achieving Prompt Disposition of Criminal Cases of the Southern District. The Supreme Court recently recognized in *National Hockey League* v. *Metropolitan Hockey Club*, 96 S.Ct. 2778 (1976), that dismissal with prejudice must be available not merely to penalize those whose conduct may be deemed to warrant such a sanction, but also to deter those who might be tempted toward such conduct in the absence of such a deterrent. In reinstating a district court's dismissal with prejudice, the Court said (96 S.Ct. at 2781):

> "If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."

In short, given the pattern of plaintiff's persistent failure to comply with Court orders and deadlines, coupled with long and continued delay in prosecuting the action, the District Court did not err in its concern for its duty to see to the disposition of cases as promptly as the particular circumstances allow.

Conclusion

The record of indifference to the prosecution of the action and disrespect for the Court's orders compiled by plaintiff and his experienced counsel, notwithstanding repeated prodding along the way, more than justified the District Court's dismissal. There is no basis for reversing its reasoned exercise of discretion, and the judgment should be affirmed.

Dated: New York, N. Y.
October 8, 1976

Respectfully submitted,

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